No. 88-2118

Supreme Court, U.S.
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MAY 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

MARVIN SOLOMON, Petitioner

and

MORTON WEIMAN, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

1. Did the trial Judge err in permitting the jury to have in their deliberation room the written transcripts of tape recorded conversations which were the heart of the Government's case, where said transcripts were not moved into evidence and which thereby gave undue prominence to the Government's case?

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OPINIONS BELOW

The only Opinion issued by the lower Courts in this case is that issued by the United States Court of Appeals for the Third Circuit on March 16, 1989, a true and correct copy of which is annexed hereto as Exhibit "A". This Opinion is a Judgment Order rejecting the two contentions then advanced before the Court of Appeals.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fifth Amendment to the United States Constitution, which states as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or Naval Forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

GROUNDS FOR JURISDICTION

On March 16, 1989, the U.S. Court of Appeals for the Third Circuit denied these Petitioners' direct appeal from a Judgment of Sentence of the U.S. District Court for the Eastern District of Pennsylvania. This Court's jurisdiction is therefore invoked under 28 U.S. Code §1257.

STATEMENT OF THE CASE

Your Petitioners are two individuals who were indicted on January 27, 1988 in the U.S. District Court for the Eastern District of Pennsylvania as per criminal numbers 88-27-1 and 2. The Indictment alleged that the Petitioners violated 18 U.S. Code §1343 pertaining to wire fraud.

On May 27, 1988, a jury found the Petitioners guilty as charged. On October 6, 1988, the Honorable John P. Fullam, Chief Judge, sentenced each Petitioner to a separate but identical term of three years imprisonment to be followed by a period of probation plus a fine in the sum of $2,500.00.

A timely appeal was taken to the U.S. Court of Appeals for the Third Circuit which denied the appeal (Exhibit "A") by a Judgment Order dated March 16, 1989.

REASONS FOR GRANTING WRIT

THE TRIAL JUDGE ABUSED HIS DISCRETION IN PERMITTING THE JURY TO RECEIVE, WITHOUT LIMITING INSTRUCTIONS, THE WRITTEN TRANSCRIPTS OF ELECTRONICALLY RECORDED CONVERSATIONS WHICH HAD NOT BEEN MOVED INTO EVIDENCE BY THE GOVERNMENT AND WHICH GAVE UNDUE PROMINENCE TO THE PROSECUTION'S SIDE OF THIS CASE.

The Government proceeded at trial of this case on a theory that the Petitioners participated in a scheme to defraud in which Certificates of Deposit were to be issued in order to support a financial statement of a company which, as it turned out, had been created by Agents of the Federal Bureau of Investigation for the purposes of this case. It was the Government's position that a fraud occurred in that this company would not have had to pay for said Certificates of Deposit but rather would have issued Notes to the Petitioners which, in furtherance of the scheme to defraud, Petitioners allegedly

agreed to conceal from any inquiry in order to support the request by this company for a bank loan.

In their defense, the Petitioners relied upon the defense of advice of counsel and contended that their attorney had advised them that the entire transaction was lawful. Petitioners specifically disclaimed any commitment on their behalf to falsely represent to those who might inquire that Promissory Notes were not issued in exchange for these Certificates of Deposit.

The Government's case was essentially based upon tape recorded conversations involving the undercover FBI Agents and the Petitioners. However, the defense case was based upon the testimony of the two Petitioners in which they disclaimed any intent to defraud.

After the jury was sent out for deliberations, the jury sent a note requesting the transcripts of the tape recordings.

Counsel for Petitioners objected on the grounds that to do this would give undue prominence to the Government's case without the jury having the benefit of the record of the testimony of the Petitioners in response thereto and because the tapes were the evidence in the case and not the transcripts. This objection was overruled. The jury thereupon received a single volume containing all sixteen of the transcripts of the tape recordings in the case. Thereafter, the jury found the Petitioners guilty as charged.

While it is true that on the first day of trial (approximately eight days before the verdict), the trial Judge instructed the jury that the tapes are the actual evidence, that the transcripts are simply an aid in following the tapes, and that in the event of any discrepancy, the tape controls, this instruction was not repeated at any subsequent time during the trial when the tapes were played, and, mmost importantly, was not

repeated when the transcripts were actually submitted to the jury deliberation room.

In addition, the trial Judge did not thereupon instruct the jury that it should not give the transcripts any undue credence, U.S. vs. Betancourt, 838 F.2d 168 (6th Cir., 1988), and that the jury need not accept the transcripts as accurate should they think that they differ from the tapes that had been heard during the trial, U.S. vs. Onori, 535 F.2d 938 (5th Cir., 1979).

Your Petitioners respectfully submit that by permitting this jury to receive a single volume containing the total of sixteen transcripts of taped conversations, as opposed to requiring the jury to listen to any particular tape in the Courtroom, the Government thereby received the benefit of having its entire case presented to the jury through this process and thereby gained an advantage to which it was not entitled as a matter of due process of law.

The record indicates that at no period in time did the Government move to have these transcripts admitted into evidence. It is therefore improper for the jury tc have had in its deliberation room items which were not in evidence in the case. U.S. vs. Hans, 738 F.2d 88 (3rd Cir., 1984).

Thus by submitting the entire book of all of the transcripts to the jury, the Government received an advantage to which it was not entitled, since it neglected to have those transcripts admitted as evidence. The jury received a written record as if they had received transcribed testimony of only the Government's part of this case. As a matter of due process of law, this undue prominence resulted in the denial of the Constitutional rights of these Petitioners. The absence of timely instructions to the jury accentuates the prejudice which occurred here.

This Court should take this opportunity to rule that it is an abuse of a discretion

for a trial Judge to permit the jury to receive into its deliberation room exhibits such as these which have not been moved into evidence and which represent critical portions of the case of the Government.

In the lower Court, the United States argued that if this was error, it was harmless under U.S. vs. Larson, 722 F.2d 139 (5th Cir., 1983) and U.S. vs. Williford, 764 F.2d 1493 (11th Cir., 1985). However, the Petitioners would argue to this Court that there were differences between the tapes and the transcripts wherein the transcripts were more prejudicial to the Petitioners than the tapes. In addition, unlike Larson and Williford, these Petitioners were not protected by limiting instructions given to the jury at the time that the transcripts were received in the deliberation room which would have cautioned the jury against giving undue weight or independent prominence to those transcripts at the expense of the true evidence in the case,

that is, the tapes, and, of course, the testimony of the Petitioners

Under all of these circumstances, these Petitioners respectfully pray that this Honorable Court review these contentions and conclude that a criminal trial jury is not to receive into its deliberation room a written record of monitored conversations which have not been introduced into evidence and which cause undue prominence to the prosecution's side of the case. particularly in the absence of timely limiting instructions.

CONCLUSION

For all the reasons above expressed, your Petitioners, Marvin Solomon and Morton Weiman respectfully pray this Honorable Court grant Certiorari and other such relief as may be appropriate in the interest of justice.

Respectfully submitted,

BURTON A. ROSE, ESQUIRE

DONALD M. MOSER, ESQUIRE
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, BURTON A. ROSE, ESQUIRE, hereby certify that three true and correct copies of the foregoing corrected Petition for a Writ of Certiorari have been served upon:

Office of the Solicitor General of the U.S.
Department of Justice
Washington, D.C.

via First Class Mail.

BURTON A. ROSE, ESQUIRE

DATED: 5/26/89

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-1794 and 88-1795

UNITED STATES OF AMERICA

VS.

SOLOMON, MARVIN
Appellant in No. 88-1794

UNITED STATES OF AMERICA

VS.

WEIMAN, MORTON
Appellant in No. 88-1975

On Appeal form the United States District Court For the Eastern District of Pennsylvania (Criminal Action Nos. 88-00027-01 and 88-00027-02)
District Judge: Honorable John P. Fullam

Submitted Under Third Circuit Rule 12(6)
March 3, 1989

BEFORE: HIGGINBOTHAM, STAPLETON, and COHEN
Circuit Judges,

EXHIBIT "A"

JUDGMENT ORDER

After consideration of the contentions raised by appellants, to wit:

(1) Whether the trial judge erred in instructing the jury regarding the defense of attorney reliance in such a way as to substantially undercut that defense and deprive the appellants of their right to a fair trial, and

(2) Whether the trial judge erred in permitting the jury to have in their deliberation room the written transcripts of tape recorded conversations where said transcripts were not in evidence,

IT IS ORDERED AND ADJUDGED that the judgment of the district court be and is hereby affirmed.

BY THE COURT

/s/ WALTER K. STAPLETON
Circuit Judge

ATTEST:

/s/
Sally Mrvos, Clerk

DATED: March 16, 1989